No. 83-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LYLE EDWARDS, *et al.*
and
DARWIN H. SMITH,
Petitioners,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioners can escape the six month limitation of Section 33(b), Longshoremen's and Harbor Workers' Compensation Act, on the basis of a conflict of interest, where the same insurance carrier provided both compensation insurance and liability coverage.

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Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals, in these consolidated appeals, affirming the granting of Summary Judgment for defendants Bechtel by the Superior Court of the District of Columbia, on the basis of the opinion of the District of Columbia Court of Appeals for the District of Columbia Circuit in related cases.

OPINIONS BELOW

The Orders of the Superior Court of the District of Columbia granting Summary Judgment are unreported

but appear as Petitioners' Appendix A, pp. 1a, 2a. The opinion of the District of Columbia Court of Appeals, from which certiorari is sought appears as Petitioners' Appendix B, p. 4a. The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Johnson* v. *Bechtel Associates Professional Corp., D.C.*, appears as Petitioners' Appendix C, p. 10a. The subsequent Order of the United States District Court for the District of Columbia in *Johnson* v. *Bechtel Associates Professional Corp., D.C.*, appears as Respondents' Appendix A.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1)(1976). Respondents do not disagree with the applicability of that provision.

RELEVANT STATUTES

Respondents agree that the relevant statutory provisions include the following, set forth by Petitioners:

District of Columbia Code, § 36-501
United States Code Title 28, § 1254(1)
United States Code Title 33, § 933(b)
(pre 1959 and past 1959 amendment versions).

Respondents do not agree that other provisions cited by Petitioners are relevant to the issues presented.

STATEMENT OF THE CASE

Petitioners filed their Petition for Writ of Certiorari on September 28, 1983. At the time said petition was filed, a petition for Writ of Certiorari, involving the identical issue, was pending before this Court in *Phillippi* v. *Bechtel Associates Professional Corp., D.C.*, (October 1983 Term). Petitioners in their brief acknowledged the fact that the petition in *Phillippi* concerned precisely the

same issues and counsel for the parties. (Petitioners' Brief p. 9). This Court denied Certiorari in *Phillippi* on October 3, 1983. Thus, *Phillippi* should control in this case.

Respondents submit that this Petition is also moot because the United States Court of Appeals for the District of Columbia Circuit in *Johnson* v. *Bechtel Associates Professional Corp., D.C.*, (Slip Opinion August 19, 1983, Petitioners' Appendix C) held that Section 80 of the Washington Metropolitan Area Transit Authority (WMATA) Compact prohibits direct negligence actions against the Bechtel defendants for alleged negligence in performing safety engineering consulting services as agent for WMATA on its construction sites.

The same counsel who represent Petitioners represented all plaintiffs in *Johnson*. Said counsel agreed to a subsequent dismissal of the Bechtel defendants in *Johnson* and represented in open court that no further efforts would be made to seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit (Respondents' Appendix A).

SUMMARY OF ARGUMENT

The Petition should be denied because the issue is identical to *Phillippi* v. *Bechtel Associates Professional Corp., D.C.*, in which this Court denied Certiorari on October 3, 1983. Moreover, Petitioners rely on arguments, issues, and decisions not previously in the record. Finally, this appeal is moot because the United States Court of Appeals for the District of Columbia Circuit has dismissed the defendants Bechtel from all related cases based upon jurisdictional grounds applicable to this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because This Court's Denial Of Certiorari In *Phillippi* Controls

The Petition should be denied because the issue is identical to *Phillippi* v. *Bechtel Associates Professional Corporation, D.C.* in which this Court denied Certiorari on October 3, 1983.

II. The Petition Should Be Denied Because It Is Based On Arguments, Issues, Documents And Decisions Not Before The Courts Below

The only difference between this Petition and the Petition in *Phillippi* is Petitioners' reliance on that portion of the Opinion in *Johnson* v. *Bechtel Associates Professional Corp., D.C.* (Slip Opinion August 19, 1983, Petitioners' Appendix C) relating to WMATA's Coordinated Insurance Program (CIP). The issues relating to WMATA's CIP are inapplicable as to Bechtel's issues in this case. Rather, the *Johnson* Opinion decided separate aspects of liability not having any relevance to the issues herein. WMATA has never been a party to this case. These issues were not presented to either the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

III. The Petition Should Be Denied Because There Is No Jurisdictional Grounds For Suits Against Bechtel In The Circumstances Of This Case And, Therefore, This Appeal Is Moot

This appeal is moot because the United States Court of Appeals for the District of Columbia Circuit has held in *Johnson* v. *Bechtel Associates Professional Corp., D.C.* (Slip Opinion August 19, 1983, Petitioners' Appendix C) that there is no jurisdiction for negligence actions against Bechtel defendants in the circumstances of this case.

The Court held that Section 80 of the WMATA Compact prohibits direct actions against the Bechtel defendants for alleged negligence in performing safety engineering consulting services as agent for WMATA on its construction sites. The Court specifically found that Bechtel, in performing such consulting services, acted as agent for WMATA. Section 80 provides that the exclusive remedy for negligence by WMATA agents is direct suit against WMATA.

The same counsel who represent Petitioners represented all plaintiffs in *Johnson* v. *Bechtel Associates Professional Corporation, D.C.* (Slip Opinion August 19, 1983, Petitioners' Appendix C). Said counsel agreed to subsequent dismissal of all Bechtel defendants in the *Johnson* consolidated and related cases, and, further, represented in open court that no further efforts would be made to seek appellate review of said decision. Said representation was incorporated into the dismissal order (Respondents' Appendix A). Therefore, this Petition is moot because the Petitioners may not sue the Bechtel defendants in any event.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE OF RESPONDENTS' BRIEF IN OPPOSITION

This will certify that on this 28th day of October, 1983, three copies of Respondents' Brief in Opposition were mailed, first class with postage prepaid, to William F. Mulroney, counsel of record for Petitioners.

GARY W. BROWN
(Counsel of Record)

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 82-306

In re

METRO SUBWAY ACCIDENT REFERRAL

FILED
SEP 12 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

This Court having reviewed and considered the Opinion of the United States Court of Appeals for the District of Columbia Circuit, issued August 19, 1983, in *Paul D. Johnson, et al.* v. *Bechtel Associates Professional Corporation, D.C., et al.*, No. 82-2017, and consolidated cases, and

Counsel for all plaintiffs having represented to the Court at a hearing in open court on September 8, 1983, that no further challenge will be made to the affirmance by the United States Court of Appeals for the District of Columbia Circuit of the granting of summary judgment to defendants Bechtel Associates Professional Corporation, D.C. and Bechtel Civil and Minerals, Inc. (hereinafter Bechtel defendants) in all cases affected by this Court's Stay Order of December 23, 1982, and

The Court having further determined that there is no just reason for delay, it is hereby

ORDERED and ADJUDGED that the Clerk of this Court shall enter judgment dismissing the complaint, as to the Bechtel defendants, with prejudice, and moot related motions, in each case listed on Appendix A annexed hereto, and it is further

ORDERED that the Clerk of this Court shall file a copy of this Order in each case, and deliver a copy of this Order to the Judge of this Court to whom each of said cases is assigned, and shall serve a copy on counsel of record in each case.

/s/ GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

September 12, 1983.